

In their motion to dismiss, Defendants assert that the Court is barred from considering Plaintiff's state law claims for medical malpractice and negligence because Plaintiff did not

Order Granting Defendants' Motion to Dismiss; Granting Plaintiff's Motion for Leave to File Second Amended Complaint  
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1 comply with the California Tort Claims Act (“CTCA”), *see* Cal. Gov’t Code §§ 910, et seq.,  
2 before filing this action. Specifically, Defendants argue that Plaintiff did not file any tort claim  
3 regarding the incidents complained of, or regarding the named Defendants. (Mot. at 7.)  
4 Defendants also assert that there is no indication that Plaintiff sought permission to file a late  
5 claim with the Victim Compensation and Government Claims Board (“VCGCB”). (*Id.*)

6 In response, Plaintiff concedes that he did not file a timely claim with the VCGCB.  
7 However, he argues that, in the months of August and September 2010, he did seek permission  
8 to file a late tort claim with the VCGCB. (Docket No. 42 at 2.) He states that each request was  
9 denied on the basis that he failed to file his claim “prior to one year beyond the incident.” (*Id.*)  
10 Plaintiff alleges that the VCGCB refused to send him the proper form to request permission to  
11 file a late claim. (*Id.*) He argues that he should be permitted to file a late claim to the VCGCB  
12 because he was without his personal property and legal materials from June 12, 2009 through  
13 June 22, 2010, due to being transferred to another facility. (*Id.* at 2-3.)

14 Before a state law claim can be brought, whether in state or federal court, the CTCA  
15 requires that the claim be presented to the VCGCB. *See* Cal. Gov. Code §§ 911.2, 945.4;  
16 *Hernandez v. McClanahan*, 996 F. Supp. 975, 977 (N.D. Cal. 1998) (failure to present timely  
17 California tort claims bars plaintiff from bringing them in federal suit). The Ninth Circuit has  
18 ruled that these procedural requirements (and compliance with them) are “substantive elements  
19 of the cause of action.” *See United States v. State of California*, 655 F.2d 914, 918 (9th Cir.  
20 1980). It is proper for federal courts to determine whether a plaintiff bringing tort claims against  
21 a public entity has complied with the CTCA. *See id.* at 918-19; *Hernandez*, 996 F. Supp. at 979.

22 Before bringing an action for damages against the State of California or its employees for  
23 personal injury, one must first file a timely claim (i.e., within six months of the date of the  
24 action which resulted in the claim) with the State Board of Control. Cal. Gov’t Code §§ 945.4,  
25 945.6. If a complainant fails to file a timely claim, he may apply to the VCGCB for leave to file  
26 a late claim. Cal. Gov’t Code § 911.4. He must apply “within a reasonable time not to exceed  
27 one year after the accrual of the cause of action.” Cal. Gov’t Code § 911.4(b). If a complainant  
28

1 is denied his application to file a late claim to the VCGCB, he may seek relief from the  
2 requirement that he present his claims to the VCGCB by filing a petition in superior court. Cal.  
3 Gov't Code § 946.6. Any such petition must be filed within six months after the application for  
4 leave to file a late claim is denied. *Id.*

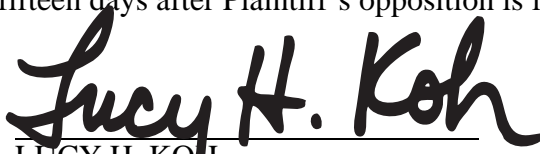
5 Even assuming that Plaintiff did indeed request permission to file a late claim to the  
6 VCGCB, once he received its denial, he was required to petition the superior court for relief.  
7 There is no indication that he did so, and Plaintiff does not assert that he complied with  
8 California Government Code § 911.4. Accordingly, Defendants' motion to dismiss Plaintiff's  
9 state law claims is GRANTED.

10 Plaintiff's motion to amend his amended complaint is GRANTED. **The Clerk shall file**  
11 **Plaintiff's proposed second amended complaint.** (Docket No. 41.) A review of the second  
12 amended complaint reveals that it contains the same factual allegations as his amended  
13 complaint, but deletes his Fourteenth Amendment claim and does not name Defendants in their  
14 official capacities. There appears to be no other substantive change.

15 Pursuant to the parties' September 8, 2011 joint stipulation, Defendants' dispositive  
16 motion is due on or before November 14, 2011. Plaintiff's opposition is due thirty days  
17 thereafter. Defendants' reply shall be filed fifteen days after Plaintiff's opposition is filed.

18 IT IS SO ORDERED.

19 DATED: 9/19/11

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LUCY H. KOH  
United States District Judge